Civil Procedure Update

A review of recent decisions on civil procedure, discovery and evidence of interest to the plaintiff's bar

Finz

In ***Brodke v. Alphatec Spine Inc.*** (2008) 160 Cal.App.4th 1569 [73 Cal.Rptr.3d 554] the Fourth District cited *Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035 in holding that a party who denies the existence of a contract cannot rely on an arbitration agreement allegedly contained in the contract.

In ***Burks v. Kaiser Foundation Health Plan, Inc.*** (2008) 160 Cal.App.4th 1021 [73 Cal.Rptr.3d 257] the Third District noted that compliance with other formal requirements of Health & Safety Code section 1363.1, regarding arbitration agreements in a health-care service plan, has no bearing on whether an arbitration disclosure met the requirement that it be prominently displayed. It held an arbitration clause that had no heading and was printed in a smaller typeface than some other parts of the document was not prominently displayed, and the trial court did not err in refusing to enforce it.

In ***Sutter's Place v. Superior Court*** (2008) 161 Cal.App.4th 1370 [75 Cal.Rptr.3d 9] the Sixth District held documents that would reveal the mental processes of city legislators when adopting a challenged ordinance are protected from discovery by the "mental processes" doctrine. It rejected an argument that the mental processes principle had been abrogated by Proposition 59, which made the public's right of access to public documents part of the state Constitution, finding nothing in the language of the Proposition justified such a conclusion. The court cited *Soon Hing v. Crowley* (1885) 113 U.S. 703 and *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721 in support of its decision.

In ***Adaimy v. Ruhl*** (2008) 160 Cal.App.4th 583 [73 Cal.Rptr.3d 926] the Second District held that in spite of a request that all papers be served on all of plaintiff's several attorneys, service of an order on only one of plaintiff's attorneys was sufficient to start the time running for an appeal if the error did not result in lack of actual notice. [*See, Moghaddam v. Bone* (2006) 142 Cal.App.4th 283.]

In ***Van Keulen v. Cathay Pacific Airways, LTD*** (2008) 162 Cal.App.4th 122 [75 Cal.Rptr.3d 471], the Second District cited *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853 in holding that for failure to prosecute with reasonable diligence, California courts have the power to dismiss an action initially filed in California but stayed on forum non conveniens grounds.

In ***Daybreak Group, Inc. v. Three Creeks Ranch, LLC*** (2008) 162 Cal.App.4th 37 [75 Cal.Rptr.3d 365], an attorney who was admitted to practice law in California belonged to a firm located out of state. The Fourth District noted that California Rules of Court 9.40 and 1.6 provide that a person admitted to practice before the highest court in any state may be permitted to appear as counsel pro hac vice. Since the rules generally define "person" to include a corporation or other legal entity, the court noted this could apply to a law firm. However, since no state admits law firms to practice, the attorney was not required to obtain pro hac vice designation for the firm as a prerequisite to his appearance in a California court.

In ***TSMC North America v. Semiconductor Mfg. Intern. Corp.*** (2008) 161 Cal.App.4th 581 [74 Cal.Rptr.3d 328], the First District said that issuing an injunction prohibiting parties from litigating in a foreign jurisdiction would involve delicate questions of comity and is therefore not appropriate without excep-

tional circumstances, such as a potential violation of constitutional rights, a threat to California's jurisdiction, or the evasion of important California public policies. The court cited *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697.

In ***Luckett v. Panos*** (2008) 161 Cal.App.4th 77 [73 Cal.Rptr.3d 745] the Fourth District noted that an order prohibiting a vexatious litigant from filing litigation without first obtaining leave of the court is an injunction. Citing *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43; and *PBA LLC v. KPOD, LTD* (2003) 112 Cal.App.4th 965, it added that such an injunction may be modified or withdrawn based on a change in facts or law, or to suit the ends of justice.

In ***Ferraro v. Camarlinghi*** (2008) 161 Cal.App.4th 509 [75 Cal.Rptr.3d 19], the Sixth District cited *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, for its discussion of issue preclusion. The court wrote that issue preclusion (i.e., res judicata; collateral estoppel) cannot result from a clerk's entry of default, since it is not final and does not adjudicate any issue on the merits. It added that a default cannot be taken against a party joined as a defendant under Code of Civil Procedure section 382, but who is in reality a plaintiff. It also found that joinder is not proper based on a complaint that fails to allege that the joined party's consent to be a plaintiff could not be obtained. An allegation that the party has not consented does not satisfy this requirement.

In ***Keener v. Jeld-Wen, Inc.*** (2008) 161 Cal.App.4th 848 [75 Cal.Rptr.3d 61], after a jury verdict was read and the jurors polled, only eight said they agreed with the verdict. Based on declarations by some jurors stating that one of the four who disagreed had voted for the verdict, the trial court entered judgment on the verdict. On appeal, the Fourth District reversed. Citing *Fitzpatrick v. Himmelmann* (1874) 48 Cal. 588, the court said that until they are polled, individual jurors are free to change their minds about a finding of fact. Since juror declarations regarding the decision-making process are not admissible, nothing established that three fourths of the polled jurors (i.e., nine) agreed on the verdict, so judgment should not have been entered on it.

In ***Royal Indemnity Co. v. United Enterprises, Inc.*** (2008) 162 Cal.App.4th 194 [75 Cal.Rptr.3d 481], the Fourth District found that realty owners were not entitled to intervene in coverage litigation between a former owner of the realty and its insurer, because their claim that intervention could improve their chances of recovering damages and environmental cleanup costs was speculative and did not give them a sufficiently direct and immediate interest in the outcome. The court cited *City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030.

In ***Chavez v. Netflix, Inc.*** (2008) 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413], the First District affirmed a trial court's order approving settlement of a class action that had been brought on behalf of approximately 5.5 million class members against a company that rented movies on DVD. The settlement called for coupons entitling each class member to extra service from defendant for one month without extra charge. The court cited *Dunk v. Ford Motor Co* (1996) 48 Cal.App.4th 1794, and found that the settlement should be presumed fair because it was reached through arm's-length bargaining between experienced counsel, with sufficient opportunity for investigation and discovery, and with only four class members objecting. It added that in approving settlement of a class action, the trial court is not required to determine the best of all possible recoveries, but only to determine whether the settlement that was reached is fair and reasonable.

In ***Olson v. Automobile Club of Southern CA*** (2008) 42 Cal.4th 1142 [74 Cal.Rptr.3d 81], the California Supreme Court held that Code of Civil Procedure section 1021.5 does not permit an award of expert witness fees to a private attorney general, since expert witness fees are not included in attorney fees, but are independent costs of litigation. The court cited its opinion in *Davis v. KGO-TV, Inc.* (1998) 17 Cal.4th 436, which reached the same conclusion regarding fee awards under the Fair Employment and Housing Act (FEHA).

In ***Duffens v. Valenti*** (2008) 161 Cal.App.4th 434 [74 Cal.Rptr.3d 311], the Fourth District found a dating service contract providing that fees are completely nonrefundable was void. The nonrefundable provision violated Civil Code sections 1694 et seq., which require such contracts to contain language making fees refundable under some circumstances. Since the arbitration clause in the void contract cannot be severed from it, the trial court was correct in denying a motion to compel arbitration.

In ***State Water Resources Control Board Cases*** (2008) 161 Cal.App.4th 304 [73 Cal.Rptr.3d 842], after a private environmental group and a public agency successfully litigated a claim that protected a public right against the State

Water Resources Control Board, the trial court awarded private attorney general fees to the public agency, but denied them to the private organization, concluding the public agency's participation made private enforcement unnecessary. On appeal, the Third District reversed, saying that might be ground for denying fees if a public attorney general was available to enforce the right at issue. Since the California Attorney General declined to take action in the matter, the court said if private attorney general fees are awarded to a public entity under Code of Civil Procedure section 1021.5, such fees cannot be denied to a private party who participated in the litigation and succeeded alongside the public entity.

In ***Metters v. Ralphs Grocery Co.*** (2008) 161 Cal.App.4th 696 [74 Cal.Rptr.3d 210], the Fourth District said that if a person signing an instrument is unaware it contains contractual provisions, no contract is formed. Citing *Rosenthal v. Great Western Financial Securities Corp.* 1996) 14 Cal.4th 394, it noted that while a party ordinarily cannot avoid the obligations imposed by failing to read a contract before signing it, a trial court did not err in denying a motion to compel arbitration based on an agreement contained in a grievance form furnished by plaintiff's employer that did not look like a contract, but contained confusingly worded arbitration provisions full of legalistic references to the employer's unattached policy against unlawful harassment, discrimination, and retaliation.

In ***Rodriguez v. Blue Cross of CA*** (2008) 162 Cal.App.4th 330 [75 Cal.Rptr.3d 754], the Second District held that an arbitration provision in a health-care service plan that appeared to be limited to medical malpractice except for one sentence that appeared to be to the contrary did not comply with disclosure requirements of Health & Safety Code section 1363.1, because it did not clearly state whether it applied to disputes other than medical malpractice.

In ***Employers Reinsurance Co. v. Superior Court*** (2008) 161 Cal.App.4th 906 [74 Cal.Rptr.3d 733], an insurer and insured had entered into a settlement agreement concerning the way claims would be handled under the policy. In subsequent coverage litigation, the Second District acknowledged that the parol evidence rule (Code Civ. Proc., § 1856) permits course of performance evidence to explain a written agreement. However, citing *Universal Sales Corp. v. Cal. Press Mfg. Co.* (1942) 20 Cal.2d 751, the court held that while course of performance evidence regarding the insurer's claims handling practice under the settlement agreement might aid in interpreting the agreement, it is inadmissible for interpretation of the policy.

In ***Costco Wholesale Corp. v. Superior Court*** (2008) 161 Cal.App.4th 488 [74 Cal.Rptr.3d 345], the Second District held that a letter from attorney to client that, following redaction by a discovery referee, contained only factual information readily available from other sources was not protected from discovery as attorney work product or by the attorney-client privilege. The court cited *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485; and *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201.

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